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In The

Supreme Court of the United States

October Term, 1982

RICHARD L. STACK,

Petitioner,

vs.

CAPITAL-GAZETTE NEWSPAPERS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ruling of the Maryland Court of Appeals, in upholding the grant of a directed verdict in the trial court, has tilted the constitutional balance created by New York Times v. Sullivan and its progeny, against libel plaintiffs who are public figures, by permitting the usurpation of the jury's function of evaluating the defendant's all-important state of mind.

2. Whether the ruling of the Maryland Court of Appeals has misapplied decisions of this Court, as well as of federal courts regarding the propriety of resolving libel cases of plaintiffs who are public figures, by directed verdict, as compared to summary judgment, where the plaintiff has presented substantial evidence of "actual malice."

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IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1982

No. _____

RICHARD L. STACK
Petitioner,

v.

CAPITAL-GAZETTE NEWSPAPERS, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner, Richard L. Stack, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Maryland Court of Appeals entered in this proceeding on June 4, 1982.

OPINION BELOW

The opinion of the Maryland Court of Appeals, reported at Md. ,445 A.2d 1038 (1982), appears in Appendix A hereto. The opinion of the Maryland Court of Special Appeals, reported at 48 Md. App. 429, 427 A.2d 1066 (1981), appears in Appendix B hereto.

JURISDICTION

The judgment of the Maryland Court of Appeals was entered on June 4, 1982. This petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States:

"Congress shall make no law respecting an establishment of religion, or

prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATEMENT OF THE CASE

This is a civil action by Petitioner Richard L. Stack (hereinafter referred to as "Mr. Stack"), against a publisher, Capital-Gazette Newspapers, Inc. (hereinafter referred to as "Capital-Gazette"), seeking damages for libel. The Declaration of Mr. Stack charges that he was defamed by an editorial published in the October 26, 1978 edition of the "Maryland Gazette" and in the October 27, 1978 edition of the "Evening Capital", both of which are newspapers owned by Capital-Gazette.

Mr. Stack, a practicing attorney, was the Republican candidate in District 32 for the Maryland Senate in the November 1978, general election. His Democratic opponent was H. Erle Schafer, who won the election and presently serves in the Maryland Legislature.

Capital-Gazette, a Maryland corporation, published in 1978 and continues to publish two newspapers, the Evening Capital and the Maryland Gazette. Capital-Gazette's agent and executive editor, Edward D. Casey, was in 1978, and still is, responsible for the editorial content of said publications. John Farrell, an agent of and reporter for Capital-Gazette in 1978 was assigned to cover Mr. Stack's campaign and had in-depth knowledge of that campaign.

Pursuant to its editorial policy, Capital-Gazette conducted an editorial

interview of Mr. Stack and his opponent shortly before the election. Present were Mr. Casey; Mr. Farrell; Ellen Sherman, another reporter; Robert Goodman, editor of the Maryland Gazette; Mr. Stack; Mr. Stack's campaign manager; Mr. Schafer and Mr. Schafer's son. At said interview, which took place at Capital-Gazette's offices, various issues were discussed by Mr. Stack and others. Mr. Stack advised those present that he had the support of Tyras Athey, his opponent's ticket-mate, and of Michael J. Wagner, whom his opponent defeated in the Democratic primary election. Importantly and more specifically, Mr. Stack, when challenged by Schafer to disclose names of Democrats who had "solicited him", responded that he had been called by Athey, had met with him, and had been told by Athey that Athey would rather

Mr. Stack win the general election than Schafer. Mr. Stack further advised those present that he had been contacted by Wagner, that Wagner also advised Mr. Stack that he would prefer Mr. Stack to win the general election, and that Mr. Wagner had given Mr. Stack certain "damaging" photographs to use as he wished in his campaign against Schafer. Mr. Stack did not claim the current support of Athey and Wagner, as a review of his testimony will disclose.

The day after the editorial interview, Mr. Casey met with Athey, Wagner and Schafer. Also present was Mr. Farrell, Capital-Gazette's Agent and reporter. At said meeting, Athey and Wagner denied any current support for Mr. Stack. Mr. Stack was not invited to this meeting and was not given any opportunity by Mr. Casey or any agent

of Capital-Gazette to comment on or rebut these protestations of non-support.

On October 23, 1978, prior to the first publication of the defamation editorial, an article, entitled "Mud Flies in Schafer-Stack Race", (Appendix E) written by Mr. Farrell, was published as the headline story on the front page of the Maryland Gazette. The article was subsequently published on the front page of the Evening Capital. Said article substantiated the statements of Mr. Stack concerning his statements regarding his contacts with Athey and Wagner.

Capital-Gazette published the following editorial on October 26 and 27, 1978, in the Maryland Gazette and Evening Capital, respectively:

DISTRICT 32

THIS SENATE race in north county has been the biggest disappointment of any race in the area. What should have been a responsible battle between two intelligent men has turned into one of gutter politics all because of the tactics of Republican challenger, Richard Stack.

After the smoke of their primary battles had cleared, we expected a race between Stack and H. Erle Schafer, two intelligent, personable candidates who we thought would discuss the issues which would affect the people of this northern Anne Arundel County district.

Instead, Stack chose to take the low road - a la former Sen. Joseph McCarthy. He had been conducting a campaign of smears and innuendos in attempting to divide the district's many democrats.

Stack has refused to discuss the issues. While Schafer answered the many questionnaires sent out by more than 20 political organizations, Stack not only refused to answer the questions, he demanded that the organizations provide him with Schafer's answers.

He insinuated that Schafer's Democratic primary opponent, Michael Wagner, was supporting him in the general election. He even said that Schafer's running mate, Del Tyras Athey, was on his side.

Both allegations have proven to

be false - as have many other things Stack has said in the campaign.

Schafer is a former county councilman and is on leave of absence from his county job as Glen Burnie urban renewal director. He certainly has more experience in government than Stack and from what we have seen in this race is a more responsible human being.

The overwhelming choice here is Schafer. Stack does not belong in public office.

Because of the defamatory editorial, Mr. Stack filed suit in the Circuit Court of Anne Arundel County, Maryland on November 1, 1978, alleging that Capital-Gazette had knowingly, falsely, recklessly and maliciously printed and published certain statements to the injury of Mr. Stack. A jury trial was prayed. Importantly, the suit was filed five days after the defamatory editorial was first published, immediately placing Capital-Gazette on notice that it would be required to substantiate its statements.

The case was tried by jury on April 1, 2, 3 and 7, 1980, Judge Raymond G. Thieme presiding. At trial, Mr. Stack presented substantial evidence refuting the allegations contained in the editorial. Mr. Farrell, who was at the time of trial, no longer an agent or employee of Capital Gazette, testified from personal knowledge that he knew of no instance during the campaign where any statement made by Mr. Stack had proven false. He also reaffirmed the validity of the "Mud Flies" article. Furthermore, it was shown that Mr. Stack did discuss the issues and did not conduct a campaign of smears and innuendos.

More importantly, when Mr. Casey was questioned as to the "many other things" Mr. Stack had said which proved false, he could remember none. He testified that he based portions of his

editorial on three political advertisements of Mr. Stack, yet it was proven, that two of the ads were published for the first time after the defamatory editorial was published. Succinctly, Mr. Casey's credibility was put in issue.

At the close of Mr. Stack's case, Capital-Gazette moved for a directed verdict; the motion was overruled. At the close of all of the evidence, Capital-Gazette again moved for a directed verdict; Judge Thieme granted the motion.

Mr. Stack filed an appeal to the Maryland Court of Special Appeals, contending that sufficient evidence of actual malice had been presented, and that the grant of direct verdict was therefore improper. The Court of Special Appeals, in a unanimous decision, reversed Judge Thieme and remanded the case for a new trial.

Capital-Gazette filed a timely Petition for Writ of Certiorari to the Maryland Court of Appeals, which granted the Petition on July 15, 1981. Following the filing of briefs and oral argument, the Court of Appeals entered its judgment on June 4, 1982, reversing the Court of Special Appeals in a 5-1 decision. Judge Harry A. Cole file a dissenting opinion, stating that the evidence presented gives rise to a jury question. Additionally, Judge Lawrence F. Rodowsky disqualified himself from sitting on this case, having been counsel of record for Capital-Gazette prior to his appointment to that bench.

The questions raised in this Court were first raised in the trial court by Demurrer to Declaration of Capital-Gazette, which was overruled by a Memorandum and Order of Judge Raymond G.

Thieme; a copy of Judge Thiem's Memorandum appears in Appendix C hereto.

Subsequently, these questions were raised at trial by Motion For Directed Verdict At The End Of Plaintiff's Evidence. Judge Thieme, after holding the matter sub curia, overruled the Motion, stating on page 382, Volume I of the joint record extract, as follows:

"The Court has had an opportunity to consider the Motion, and viewing the evidence most favorably in light of the Plaintiff, the Court feels it has to overrule the Motion. The Court will overrule the Motion."

The questions were raised again by Motion For Directed Verdict At The End Of All The Evidence. Judge Thieme granted this Motion. His ruling is printed on pages 492-493, Volume I of the Joint Record Extract; a copy of Judge Thieme's ruling appears in Appendix D hereto.

The questions were next raised by Plaintiff's timely Motion for New Trial, filed on April 10, 1980. Judge Thieme's Order, denying said motion and filed on June 5, 1980, states:

"Plaintiff's Motion for New Trial having come before the Court for hearing, the proceedings were read and considered, counsel were heard in chambers, and after due consideration, it is this 4 day of June, 1980, by the Circuit Court for Anne Arundel County, ORDERED, that the Motion for New Trial be, and the same is hereby, denied."

Subsequently, questions were raised in a timely appeal by Petitioner to the Maryland Court of Special Appeals; a copy of the Opinion of that Court appears in Appendix B hereto.

Finally, in the Maryland Court of Appeals, these questions were presented for review; a copy of the Opinion of that Court appears in Appendix A hereto.

REASONS FOR GRANTING THE WRIT

THE USURPATION OF THE JURY'S FUNCTION IN EVALUATING THE STATE OF MIND OF LIBEL DEFENDANTS HAS FUNDAMENTALLY UPSET THE BALANCE SET FORTH IN NEW YORK TIMES V. SULLIVAN AND ITS PROGENY.

1. Evaluation of the Credibility and State of Mind of Libel Defendants Should be Made by the Jury Rather Than by the Trial Judge.

The propriety of dealing with defamation actions by directed verdict has never been decided by this Court. Nor has the appropriateness of disposing of such actions through summary judgment ever been directly considered. Nevertheless, in Note 9 of Hutchinson v. Proxmire, 443 U.S. 111, 120, 99 S. Ct. 2675, 61 L.Ed.2d 411 (1979), doubts

were raised about the "rule" whereby determinations of actual malice, as defined by New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686(1964), and its progeny, were to be made by summary judgment. The "proof of 'actual malice'," Chief Justice Burger wrote,"does not readily lend itself to summary disposition."

Defamation cases involving either public officials or public figures* should not be disposed of summarily because the defendants' states of mind are at issue. In balancing the

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* See Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974).

First Amendment concerns for uninhibited, robust, and wide-open debate on public issues against the protection of the private personality,* this Court has required the trier of fact to evaluate the subjective state of mind of the defendants at the time of the defamatory publication.

In Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S.Ct. 486 (1962), an antitrust case where state of mind was also in issue, this Court

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*See e.g. Rosenblatt v. Baer, 383 U.S. 75 (1966), where Mr. Justice Brennan wrote, at page 86, that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation."

held that summary judgment was inappropriate:

"We believe that summary procedures should be used sparingly...where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

Although this Court has not yet so ruled, it is only logical that the Poller reasoning be extended to New York Times libel actions and the case at bar. Despite the fact that witnesses are heard in cases resulting in directed verdict as opposed to summary judgment, if the jury is not given the opportunity to evaluate the credibility of those witnesses, as well as their states of mind, it is as though that jury had not sat at all.

2. If The Trial Judge Is Permitted To Evaluate The Credibility And States Of Mind Of New York Times Defendants, Thereby Usurping An Important Function Of The Jury, Recovery By New York Times Plaintiffs Will Be Precluded Except In The Unlikely Event That Said Defendants Admit To Their Knowing Falsity Or Their Reckless Disregard For The Truth.

When the evidence that was produced at the trial of the case at bar is considered, it is difficult to understand what else the plaintiff might have presented to get his case to the jury. In nearly four days of testimony, including that of the Defendant's agents, the Plaintiff either refuted or, at the very least, raised the issue of credibility for, nearly every allegation of fact contained in the

subject editorial. Furthermore, in that the Defendant was unable to explain or produce the bases for its defamatory* statements, except for the testimony of the Defendant's agent that he believed the statements to be true, the mental state and credibility, i.e. the actual malice, of the Defendant was called into question.

In St. Amant v. Thompson, 390 U.S. 727, 732, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), Mr. Justice White wrote that:

"The defendant in a defamation action cannot, however, insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was made in good faith." (Emphasis supplied).

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* See Judge Thieme's Memorandum and Order which appears in Appendix C hereto.

Yet, on the basis of the Defendant's testimony alone, the trial judge granted directed verdict for the Defendant.* Considering that a directed verdict was denied to the Defendant at the close of the Plaintiff's case, and also that the editor of the Defendant's newspapers was the only non-hostile witness called by the Defendant in support of its case, that this is exactly what occurred is all the more obvious.

If the Plaintiff had not presented any evidence of actual malice, he would concede that a directed verdict might be an appropriate means of disposing of his case, But such was not what

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* See Judge Thieme's ruling which appears in Appendix D hereto.

occurred in the case at bar, as the Plaintiff sufficiently and successfully refuted the defamatory statements made by the Defendant.

Regarding the assertion that the Plaintiff's allegations of support from Michael Wagner and Tyras Athey, members of the opposition party, were proven to be false, the Plaintiff presented a front page article (Appendix E hereto) published in the Defendant's newspapers immediately prior to the publication of the subject editorial. That article, which was written by John Farrell, one of the Defendant's agents, and admittedly read by Edward Casey, the Defendant's editor and the author of the editorial, prior to the publication of the editorial, verified the "false" allegations:

"Athey admits he did meet with Stack after calling the Republican in a fit of 'post-election emotion.' He says he has since reconciled his differences with Schafer and does not intend to help Stack in any way." (Emphasis supplied).

The article further stated:

"and Wagner admits that he did pass photographs to Stack but that he has since reached an understanding with Schafer, mindful of what happens to Democrats who get caught in the open supporting Republicans."

With respect to the contention that the Plaintiff had conducted a campaign of smears and innuendos and had refused to discuss the issues, the plaitiff offered the testimony of numerous witnesses, including the attorney for the Board of Election Supervisors, to successfully prove their falsity. But more importantly to the issue of actual malice, the Plaintiff showed that the Defendant

had no bases for these, as well as most of the other, contentions and thus must have fabricated them.

For instance, the Defendant published that "many other things Stack has said in the campaign" have proven to be false. Yet, when the author of that statement was asked to enumerate those things at trial, he could think of no other statement which proved to be false. At least one judge of the Maryland Court of Appeals attributed this inability to produce other false statements to the year and a half that elapsed between the publication of the editorial and the time of trial. But as has been shown by the Plaintiff, the original suit was filed against the Defendant immediately after publication and prior to the general election, thereby placing the

Defendant on notice that it would be required to defend its statements.

When pressed further for the basis of the "many other things" statement, the Defendant offered three political advertisements run by the Plaintiff. The tenuousness of that assertion was shown, however, in that the Plaintiff proved that two of those advertisements were run after the publication of the editorial.

At the very least, the credibility of the various witnesses, especially of the editorial's author, Edward Casey, was at issue. If the trier of fact were not convinced that the Defendant had credible bases for its factual statements, then it could have found that the Defendant published those

statements with knowing falsity or reckless disregard for the truth, i.e. with actual malice. But the trial judge, by granting the Defendant a directed verdict, virtually eliminated the issue of credibility and unjustifiably accepted the Defendant's feeble denials of malice. This is a direct contravention of St. Amant, supra, as well as of basic concepts of fairness. For to remove the issue of credibility from the jury, thereby permitting a defendant to merely testify that it believed what it published to be true, is to allow recovery for New York Times plaintiffs only when the defendants admit or confess their malice. In other words, never.

3. In Permitting New York Times Libel Cases to be Taken Away From the Jury, Despite the Presentation of Substantial Evidence of Actual Malice, the Maryland Court of Appeals Has Violated Its Own, As Well As Federal, Case Law.

Although Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S.Ct. 486 (1962) was not a defamation case, the Maryland Court of Appeals applied its reasoning to a recent libel and slander suit. In Berkey v. Delia, 287 Md. 302 (1980), at page 332, 333, the highest Maryland Court discussed the doubts that it had as to the propriety of summary judgment in cases involving the New York Times rule. Stating that the credibility of witnesses may not be weighed on a motion for summary judgment, the Maryland Court held that whether the plaintiff adduces clear and convincing evidence to support his action "must be determined by the trier

of fact who will weigh, compare, test, and judge its worth, considering it in connection with all the facts and circumstances presented in evidence." Since the jury, rather than the trial judge, is the trier of fact, it is thus not appropriate for the latter to usurp the former's legal function, whether by summary judgment or, as in the case at bar, by directed verdict.

Federal Courts have also considered this matter. In Goldwater v. Ginzburg, 261 F.Supp. 784, 788 (S.D.N.Y. 1966), a case precluding summary judgment, it was stated that libel actions are especially appropriate for trial to a jury. The court there noted that in England such actions are among the few actions which must be tried to a jury if one party so desires. And in Croley v. Matson Navigation Co., 434 F.2d. 73

(5th Cir. 1970), it was held that summary judgment should be used sparingly in actions involving state of mind as

"[m]uch depends on the credibility of the witnesses testifying as to their own states of mind. In these circumstances the jury should be given the opportunity to observe the demeanor, during direct and cross examination of the witnesses whose states of mind are at issue." (Emphasis supplied).

When evidence of state of mind has been presented at trial, bringing the credibility of witnesses into play, that evidence must be evaluated by the jury. This was the holding in Berkey, supra, despite the Maryland Court's refusal to entirely rule out the use of summary judgment in defamation cases involving the New York Times rule. Nonetheless, in the case at bar, the Maryland Court of Appeals allowed a trial judge to prevent the jury from making that critical evaluation. Succinctly, this flies

in the face of its own decision, as well as of a number of federal jurisdictions. At the very least, this Court is presented with both the confusion that exists with respect to this issue, and the opportunity to set a uniform policy regarding the propriety of a directed verdict in New York Times libel actions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Russell J. Bennett

For Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 53

September Term, 1981

CAPITAL-GAZETTE NEWSPAPERS, INC.

v.

RICHARD L. STACK

Murphy, C. J.
Smith
* Digges
Eldridge
Cole
Davidson
JJ.

Opinion by Davidson, Jr.
Murphy, C. J., concurs in
the result.
Cole, J., dissents.

Filed: June 4, 1982

*Digges, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

This case concerns an interpretation and application of the principle established in New York Times Co. v. Sullivan, 376 U. S. 254, 84S Ct. 710 (1964), that in a defamation action a public figure must prove by clear and convincing evidence that the allegedly false defamatory publication was made with "actual malice."

During the 1978 general election, the respondent, Richard L. Stack, was the Republican candidate for election to the Maryland State Senate in District 32, Anne Arundel County. He had never before held public office. He was opposed by H. Erle Schafer, the Democratic candidate. Schafer had previously served as a member of the Anne Arundel County Council and then as Urban Renewal Director for Glen Burnie. The petitioner, Capital-Gazette Newspapers,

Inc. (publisher), was the owner and publisher of two newspapers, the Maryland Gazette and the Evening Capital, both circulated in Anne Arundel County. Edward D. Casey was the executive editor of these newspapers and was responsible for their editorial content. John A. Farrell was then a staff reporter who covered, among other things, the Stack-Schafer campaign. In both the 26 October 1978 edition of the Maryland Gazette and the 27 October 1978 edition of the Evening Capital, identical editorials endorsing Schafer's candidacy were published. Those editorials said:

"DISTRICT 32"

"THIS SENATE race in north county has been the biggest disappointment of any race in the area. What should have been a responsible battle between two intelligent men has turned into one of

gutter politics - all because of the tactics of Republican challenger Richard Stack.

"After the smoke of their primary battles had cleared, we expected a race between Stack and H. Erle Schafer, two intelligent, personable candidates who we thought would discuss the issues which would affect the people of this northern Anne Arundel County district.

"Instead, Stack chose to take the low road - a la former Sen. Joseph McCarthy. He has been conducting a campaign of smears and innuendoes in attempting to divide the district's many Democrats.

"Stack has refused to discuss the issues. While Schafer answered the many questionnaires sent out by more than 20 political organizations. Stack not only refused to answer the questions,

he demanded that the organizations provide him with Schafer's answers.

"He insinuated that Schafer's Democratic primary opponent, Michael Wagner, was supporting him in the general election. He even said that Schafer's running mate, Del. Tyras Athey, was on his side.

"Both allegations have proven to be false- as have many other things Stack has said in the campaign.

"Schafer is a former county councilman and is on leave of absence from his county job as Glen Burnie urban renewal director. He certainly has more experience in government than Stack and from what we have seen in this race is a more responsible human being.

"The overwhelming choice here is Schafer. Stack does not belong in public office." (Emphasis added.)

On 1 November 1978, in the Circuit Court for Anne Arundel County, Stack sued the publisher for libel alleging, among other things, that the publisher had acted with actual malice. In April, 1980, a jury trial was held.

At the trial, much evidence was presented concerning the circumstances preceding and surrounding the publication of the allegedly false defamatory editorial. Stack himself testified that his campaign was premised upon his personal philosophy that a public official should not be obligated to any individual, political group or other special interest group. More specifically, in describing this philosophy, he said:

"A...I felt that what the people wanted was a person who was not beholden to anyone once they achieved office. That they owed no one, that they owed

no special interest. That they owed no one for an endorsement. They--they owed no group. They owed no campaign manager, they owed no -- no one, because if that candidate successfully achieved office, but at the same time had to give something away, in my term, sell out, in order to achieve the office then he was not his own person once he achieved that office. And in my estimation that person was lost before they even started, because they could not be their own person in making the decisions for their constituents. So, we filed -- I filed a campaign based upon that philosophy and that premise.

"Q [Respondent's Counsel]... Now, when you use the phrase, sell out, what do you mean by sell out?

"A I'm talking about making compromises in order to get endorsements,

support, raise money, or do anything else that will help toward getting elected. Selling out, or getting these endorsements has always been the -- a way of life in Anne Arundel County politics.

"Q But you're not referring to money actually being handed to someone selling out?

"A I'm not referring to money. I'm referring to the fact that this has been the way of politics in Anne Arundel County and in my district, which is located in Anne Arundel County, since I have known anything about politics. And it is my opinion that someone who goes in that way cannot vote as his constituents want him to vote because he owed favors. And I refuse to achieve election that way. I just would not."

According to Stack, campaign strategies consistent with this philo-

sophy were developed. He did not seek the endorsement of politicians or of special interest groups. Although he did not have a platform, he nonetheless discussed issues when attending coffee hours, campaigning door-to-door, participating in debates with his opponent, appearing at candidates' nights, and engaging in press interviews. In addition, he responded to questionnaires submitted to him by newspapers and groups not representing special interests (i.e., Common Cause and the League of Women Voters). He refused, however, to respond to questionnaires submitted to him by groups representing special interests, (i.e., American Association of Retired Persons, Sierra Club, Metropolitan Baltomore AFL-CIO, Fraternal Order of Police, Maryland and District of Columbia Rifle and Pistol Association, Inc., United

Christian Citizens, Inc. and Associated Builders and Contractors, Inc.).

The record shows that on 3 October 1978, Stack wrote a letter to Schafer, with copies to Casey, as well as to various reporters, requesting copies of Schafer's answers to the questionnaires submitted to him by groups representing special interests. The letter additionally indicated that Stack would answer the questions posed if they were raised in a different format under different circumstances.

On 19 October and 23 October, 1978, Stack placed an ad in the Maryland Gazette and the Evening Capital entitled, "Has Erle Schafer Sold Out?" The text of the ad pointed out that Schafer had answered questionnaires submitted by special interest groups while Stack had not and that "the public was entitled

to know what [Schafer] had given away in order to achieve office."

The record further shows that on or about 19 October 1978, in accordance with the newspapers' policy, the publisher held a meeting for the purpose of determining which of the candidates it would endorse. The meeting was called by Casey. At that meeting, Stack, Schafer, Casey, Farrell, and others were present. While Stack discussed some issues at the meeting, he refused to discuss others. Stack asserted that he had the support of Tyras Athey, a Democrat who was then a member of the House of Delegates seeking reelection on Schafer's ticket, and Michael J. Wagner, a Democrat who was then a member of the Maryland State Senate, but who had been defeated by Schafer in the preceding primary. At that meeting, Schafer called Stack a liar

and accused him of soliciting support from Democrats.

Casey was disturbed by the fact that two Democrats then in public office might be supporting a Republican in a district that was heavily Democratic and that had never elected a Republican to office. The next day, on 20 October 1978, a second meeting was held at which Schafer, Athey, Wagner, Casey, Farrell, and Patrick Scannello, a Delegate from Glen Burnie, were present. At that time, Athey and Wagner both denied that they were then supporting Stack.

On 21 and 23 October 1978, an article written by Farrell was published in each of the publisher's papers. The article indicated that there was "in fighting" in the Democratic Party. It pointed out that although Athey had admitted that he did meet with Stack after

"calling the Republican in a fit of post-election emotion," he nonetheless had subsequently reconciled his differences with Schafer and did not intend to help Stack in any way. The article further asserted that the day after the primary, Wagner's secretary had given Stack three photos purporting to show some allegedly delapidated buildings owned by Schafer, the former Urban Renewal Director. The article further stated that Wagner, "mindful of what happens to Democrats who get caught in the open supporting Republicans," had subsequently reached an understanding with Schafer. The article concluded that Wagner "who began as friend and turned to foe has become a friend again-- at least on paper." Finally, the article reported that Stack said he would win because "the Democrats still hurt from the bitter primary and

some North County Democrats agree." Farrell wrote the article despite the fact that at the 20 October 1978 meeting Athey and Wagner told him that they were not supporting Stack. Farrell's only explanation for writing the article was that he "just generally [has] to take almost anything a politician says with a grain of salt."

Thereafter, in accordance with the papers' policy, Casey solicited the views of others, including Farrell, and the managing editors of the Maryland Gazette and the Evening Capital, regarding the papers' editorial endorsements. Although Farrell endorsed Stack, the two others whose views were solicited strongly supported Schafer.

On direct examination, Casey testified that before writing the editorial he examined the background and

experience of each of the candidates. He reviewed various news stories written during the campaign and considered his own personal observations including the 19 and 20 October 1978 meetings. He evaluated the techniques utilized by the candidates throughout the campaign. He took cognizance of the opinions of those whose views he had solicited. He noted that Schafer had been a member of the County Council and an Urban Renewal Director, whereas Stack had never previously held public office; that Stack did not have a platform; that he had refused to discuss issues at various times and places; that he had refused to answer questionnaires submitted to him by various organizations; that he had asserted that prominent Democrats were supporting him; that those Democrats had denied the assertion; and that he had utilized

an ad designed to villify Schafer. Based on this information, it was Casey's opinion that Stack had made false statements and had conducted a campaign of smears and innuendos designed to divide the Democrats in the district by "spreading the word that Athey and Wagner were supporting Mr. Stack."

On cross-examination Casey conceded that before writing the editorial his personal knowledge of Stack was limited to what he observed at the publisher's 19 October 1978 candidate endorsement meeting. He additionally conceded that he had not solicited an opinion concerning candidate endorsement from all of the reporters who had covered the campaign, including the reporter primarily responsible for campaign coverage. Indeed, he admitted that the only reporter from whom he solicited an

opinion concerning campaign endorsement was Farrell, who had in fact recommended the endorsement of Stack. Casey further conceded that after Athey and Wagner asserted that they were supporting Schafer, not Stack, he did not call Stack for comment. Moreover, Casey admitted that because he believed the assertions of Athey and Wagner, he did not make any effort to investigate the accuracy of Farrell's 21 and 23 October 1978 article indicating that there was "infighting" in the Democratic Party. Additionally, Casey admitted that he did not make any effort to investigate the accuracy of Stack's ad questioning whether Schafer had sold out. Ultimately, the following colloquy took place:

"Q [Respondent's Counsel]... I believe you stated in your editorial, both allegations are proven to be false

with reference to the allegation of Wagner and Athey's support-- as have many other things that Stack has said in the campaign. What were the many other things that Mr. Stack said in his campaign that proved to be false?

"A I don't know exactly many other things.

"Q Well, that's what it says. It says, as have many other things.

"A I'm not finished my answer. I would say that running advertisements, has Erle Schafer sold out. I mean, I think that is certainly a smear and an innuendo. And in my mind, at least, and untruth....

...

I'm just trying to recall some other things here now. Oh, I would definitely say when he -- he tells me to my face that he has the support of Mr. Athey and

Mr. Wagner, and then less than 24 hours later these two people tell me to my face that in no way are they supporting him. I think -- I'd have to say that's an untruth.

"Q Okay. Now, I let you finish your answer, and I'll go back and ask the question again. I prefaced the question when I asked it with both allegations have proven to be false. The two that you just gave me, with reference to Wagner -- with reference to Athey and Wagner. It also says, as have many other things Stack has said in the campaign. The other thing you said was an ad that asked a question, has Erle Schafer sold out. Now, I'm asking you, what other things he said in the campaign that proved to be false?

"A I cannot be specific any more than I have been on something that

happened a year and a half ago. ...I can't remember anything else at this point." (Emphasis added.)

At the close of all the evidence, the trial court granted the publisher's motion for a directed verdict. Stack appealed to the Court of Special Appeals which reversed the judgment of the trial court. Stack v. Capital-Gazette Newspapers, Inc., 48 Md. App. 429, 427 A.2d 1066 (1981). The publisher filed a petition for a writ of certiorari that we granted. We shall reverse the judgment of the Court of Special Appeals.

In New York Times Co. v. Sullivan 376 U.S. 254, 270, 84 S. Ct. 710, 721 (1964), the United States Supreme Court observed that this country has

"a profound national committment to the principle that debate on public issues should be uninhibited, robust,

and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

Quoting from Coleman v. MacLennan, 78 Kan. 711, 724, 98 P. 281, 286 (1908), that Court said:

"'[I]t is of the utmost consequence that the people should discuss the character and qualifications of candidates for their suffrages. The importance to the state and to society of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and occasional injury to the reputations of individuals must yield to the public welfare, although at times such injury may be great. The public benefit from

publicity is so great, and the chance of injury to private character so small that such discussion must be privileged.'" New York Times Co., 376 U.S. at 281, 84 S.Ct at 726-27.

In acknowledging the reality of the political milieu in particular, that Court, quoting from Mill, On Liberty (Oxford: Blackwell, 1947), at 47, stated:

"'***[T]o argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion *** all this, even to the most aggravated degree, is so continually done in perfect good faith, by persons who are not considered, and in many other respects may not deserve to be considered, ignorant or incompetent, that is rarely posible, on adequate grounds,

conscientiously to stamp the misrepresentation as morally culpable; and still less could law presume to interfere with this kind of controversial misconduct. '" New York Times Co., 376 U.S. at 272 n.13, 84 S. Ct. at 722 n.13.

The Court recognized that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need *** to survive.'" New York Times Co., 376 U.S. at 271-72, 84 S.Ct. at 721. Stating that a "defense for erroneous statements honestly made" is essential and that critics of official conduct should not be required "to guarantee the truth of all [their] factual assertions," the Supreme Court established a rule governing recovery of damages in a libel action brought

by a public official against critics of his official conduct. New York Times Co., 376 U.S. at 278-79, 84 S.Ct. at 725 Thus, the Supreme Court declared: "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'-- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." New York Times Co., 376 U.S. at 279-80, 84 S.Ct. at 726.

Subsequent Supreme Court cases have explicated the standard of "actual malice." Thus, in Garrison v. State of Louisiana, 379 U.S. 64, 74, 85 S.Ct.209, 216 (1964), the Supreme Court described "actual malice" as "false statements

made with [a] high degree of awareness of their probable falsity." In St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325 (1968), the Supreme Court stated that publishing with "serious doubts as to the truth of [the] publication ... shows reckless disregard for truth or falsity and demonstrates actual malice." In Gertz v. Robert Welch, Inc., 418 U.S. 323, 335 n.6, 94 S.Ct. 2997, 3004 n.6 (1974), the Supreme Court reiterated that "subjective awareness of probable falsity" constitutes actual malice. In Herbert v. Lando, 441 U.S. 153, 160, 99 S.Ct. 1635, 1640 (1979), the Supreme Court emphasized that actual malice requires examination of "the conduct and state of mind" of the publisher and a showing that the publisher "must know or have reason to suspect that his

publication is false."

In New York Times Co., and its progeny, the Supreme Court not only established the "actual malice" standard, but also considered the proof necessary to support a finding of "actual malice." The existence of actual malice can be established "only on clear and convincing proof." Gertz, 418 U.S. at 342,94 S.Ct. at 3008; see also, Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 83, 88 S.Ct. 197, 199 (1964); New York Times Co., 376 U.S. at 285-86, 84 S.Ct. at 729.

"Actual malice" can be established by showing that: a defamatory statement was a calculated falsehood or lie "knowingly and deliberately published," Garrison, 379 U.S. at 75,85 S.Ct. at 216; see also, Cantrell v. Forest City Publishing Co., 419 U.S.245,

252-53, 95 S.Ct. 465, 470-71 (1974); a defamatory statement was the product of the publisher's imagination; a defamatory statement was so inherently improbable that only a reckless person would have put it in circulation; or the publisher had obvious reasons to distrust the accuracy of the alleged defamatory statement or the reliability of the source of the statement, St. Amant 390 U.S. at 732, 88 S.Ct. at 1326.

"Actual malice" cannot be established merely by showing that: the publication was erroneous, derogatory or untrue, Gertz, 418 U.S. at 340-41, 94 S.Ct. at 3007; St. Amant, 390 U.S. at 732, 88 S.Ct at 1326; New York Times Co., 376 U.S. at 281, 84 S.Ct. at 726; the publisher acted out of ill will, hatred or a desire to injure the official, Greenbelt Cooperative Publish-

ing Ass'n v. Bresler, 398 U.S. 6, 10-11 90 S.Ct. 1537, 1540 (1970); Garrison, 379 U.S. at 73-74, 85 S.Ct. at 215; the publisher acted negligently, Garrison, 379 U.S. at 79, 85 S.Ct. at 218; New York Times Co., 376 U.S. at 288, 84 S.Ct. at 730; the publisher acted in reliance on the unverified statement of a third party without personal knowledge of the subject matter of the defamatory statement, St. Amant, 390 U.S. at 732, 88 S. Ct. at 1326; or the publisher acted without undertaking the investigation that would have been made by a reasonably prudent person, Gertz, 418 U.S. at 332, 94 S.Ct. at 3003; St. Amant, 390 U.S. at 731, 88 S.Ct. at 1325; Beckley Newspapers Corp., 389 U.S. at 84-85, 88 S.Ct. at 200; New York Times Co., 376 U.S. at 287-88, 84 S.Ct. at 730. Moreover, malice is not established if there is

evidence to show that the publisher acted on a reasonable belief that the defamatory material was "'substantially correct'" and "there was no evidence to impeach the [publisher's] good faith," New York Times Co., 376 U.S. at 286, 84 S.Ct. at 729.

These principles have been frequently reiterated by the Supreme Court. E.g., Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 163-64, 99 S.Ct. 2701, 2705 (1979); Monitor Patriot Co. v. Roy, 401 U.S. 265, 270-71, 91 S.Ct. 621, 624-25 (1971); Time, Inc. v. Pape, 401 U.S. 279, 284, 289-92, 91 S.Ct. 633, 636, 639-40, reh'g denied, 401 U.S. 1015, 91 S.Ct. 1248 (1971); Curtis Publishing Co.v.Butts, 388 U.S. 130, 164-65, 87 S.Ct. 1975, 1996 (Warren, C.J., concurring), reh'g denied, 389 U.S. 889, 88 S.Ct.

11, 13 (1967). Moreover, they have been adopted and applied in Maryland. Berkey v. Delia, 287 Md. 302, 314-18, 413 A.2d 170, 175-77 (1980); A.S. Abell Co. v. Barnes, 258 Md. 56, 58-70, 265 A.2d 207, 209-16 (1970), cert. denied, 403 U.S. 921, 91 S.Ct. 2224 (1971).

Applying these principles to the instant case produces a clear result. Here there is no question that the respondent was a candidate for public office and was, therefore, a public figure. Monitor Patriot Co., 401 U.S. at 271-72, 91 S.Ct. at 625; Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 299, 91 S.Ct. 628, 631 (1971); A.S. Abell Co., 258 Md. at 75, 265 A. 2d at 218. Accordingly, the New York Times Co. "actual malice" standard applies. Therefore, the respondent had the

burden of presenting sufficient evidence from which a trier of fact could find or infer, by applying the clear and convincing evidence test, that the publisher was aware that its editorial statements were false, or that it published them with reckless disregard of whether they were false. Berkey, 287 Md. at 317-20, 413 A.2d at 177-78; A.S. Abell Co., 258 Md. at 77, 265 A.2d at 219.

The record here shows that Casey testified that he was not acting out of ill will, hatred or a desire to injure Stack. Casey had observed Stack at the 19 October 1978 candidate endorsement meeting and, therefore, had some personal knowledge of him. Before writing the editorial, Casey undertook a substantial investigation of the campaign. He examined the background

and experience of each of the candidates. He reviewed various news stories written during the campaign. He solicited candidate endorsements from others. He noted that Stack did not have a platform, had on occasion refused to discuss issues, and had on occasion refused to answer questionnaires. He was present when Stack asserted that prominent Democrats were supporting him as well as when those Democrats subsequently denied the assertion. He believed the Democrats and concluded that Stack had made a false statement. He reviewed an ad used by Stack that he believed contained untruths designed to villify Schafer. All of this evidence shows that Casey acted on a reasonable belief that the statements in the editorial were substantially correct. There was no evidence to impeach Casey's good

faith.

The editorial contains a statement to the effect that many things Stack said in the campaign were false. Casey's testimony identifying two specific occasions on which he believed Stack had told untruths served as an adequate basis for this allegedly false defamatory editorial statement. That testimony supports an inference that the allegedly false defamatory editorial statement was not the product of the publisher's imagination and was most assuredly not a calculated falsehood or lie. Indeed, that testimony supports the inference that, under the circumstances, the allegedly false defamatory editorial statement was "no more than rhetorical hyperbole," Greenbelt, 398 U.S. at 14, 90 S.Ct. at 1542, often present in vehement debate,

and in the misstatements and misrepresentations ordinarily associated with the political milieu, New York Times Co., 376 U.S. at 270, 273 n.13, 84 S.Ct. at 721, 722 n.13. Thus, the record does not show that Casey was aware of any falsity in the editorial.

While the record shows that Casey did not solicit an opinion from all of the reporters who covered the campaign, did not call Stack for comment after Athey and Wagner asserted that they were supporting Schafer, and did not make any effort to verify either the accuracy of a staff reporter's article relating to infighting in the Democratic Party or of Stack's ad questioning whether Schafer had sold out, the record also shows that Casey made some effort to investigate. At most, Casey's investigatory omissions

support a finding of negligence. Garrison, 379 U.S. at 79, 85 S.Ct. at 218; New York Times Co., 376 U.S. at 288, 84 S.Ct. at 730. They do not show that Casey acted with reckless disregard of the truth of the editorial statements.

We can only conclude that there was insufficient evidence from which a trier of fact could find or infer that the publisher had a high degree of subjective "awareness of [the] probable falsity" of the editorial statements or that it had "serious doubts as to the truth" of the editorial statements or that it "knew or had reason to suspect" that the editorial statements were false. The trial court did not err when it granted the publisher's motion for a directed verdict. Accordingly, we shall reverse the judgment of the Court of Specials.[1]

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED

COSTS TO BE PAID BY RESPONDENT.

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[1]In view of our decision, we need not consider the petitioner's remaining contention that its editorial statements were not factual assertions, but rather were constitutionally protected opinion and fair comment.

Appendix A

IN THE COURT OF APPEALS OF MARYLAND

No. 53

September Term, 1981

CAPITAL-GAZETTE NEWSPAPERS, INC.

v.

RICHARD L. STACK

Murphy, C. J.
Smith
*Digges
Eldridge
Cole
Davidson
J.J.

Concurring Opinion by Murphy, C. J.

Filed: June 4, 1982

*Digges, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant

to the Constitution Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

Concurring opinion by Murphy, C.J.:

While I concur with the result in this case, I think the majority has not fully explicated the basis for the decision of the Court of Special Appeals. That court's opinion, in my judgment, merits further discussion.

The Court of Special Appeals held that the evidence before the trial court, when viewed in a light most favorable to Stack, was such that the trier of fact could conclude there was "clear and convincing" evidence of a reckless disregard of the truth or falsity of the statements made in the editorial. The court explained that:

"Appellee had no explanation for that portion of the editorial wherein Stack was accused of making many other state-

ments in the campaign which had proven to be false. In short, at least so far as that part of the editorial which states 'as have many other things Stack has said in the campaign' is concerned, it would appear that appellee could be found to have recklessly disregarded the truth or falsity of that statement; thus the fact finder could have found actual malice."

Stack v. Capital-Gazette Newspapers, 48 Md. App. 429, 437, 427 A.2d 1066 (1981).

The Court today lightly glosses over this holding with the assertion that:

"Casey's testimony identifying two specific occasions on which he believed Stack had told untruths served as an adequate basis for this allegedly false defamatory editorial statement. That testimony supports an inference that the allegedly false defamatory editorial statement was not the product of the publisher's imagination and was most assuredly not a calculated falsehood or lie."

The mere fact that Stack may have lied on two previous occasions did not, as a matter of law, give the publisher carte blanche to accuse him of making other false statements, on the

theoretical assumption that if Stack had lied before, surely he would always lie again.

I think the result today is justified because there was no evidence, clear, convincing, or otherwise, that Casey made the allegation with "[a] high degree of awareness of [its] probable falsity," St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325 (1968); or that the allegation was the product of Casey's imagination; or so inherently improbable that only a reckless person would publish it. Id. at 732. Casey testified that he viewed the Stack ad, "Has Erle Schafer Sold Out," as being:

"a smear and an innuendo. And in my mind, at least, an untruth. . . ." (Emphasis added.)

While this is only one "other occasion," the record does not indicate that Casey

made his statement purely as a matter of whim, or momentary caprice. Indeed, it establishes only that he could not recall every specific reason on which he based his statement, since more than a year and a half had elapsed since the editorial was published. At most, the statement could be characterized as "rhetorical hyperbole." As the majority correctly notes, such hyperbole, in the circumstances of this case, falls within the boundaries of protected speech. It is for this reason that I would reverse the judgment below.

With these additional comments, I respectfully concur in this decision.

IN THE COURT OF APPEALS OF MARYLAND

No. 53

September Term, 1981

CAPITAL-GAZETTE NEWSPAPERS, INC.

v.

RICHARD L. STACK

Murphy, C. J.
Smith
*Digges
Eldridge
Cole
Davidson,
JJ

Dissenting Opinion by Cole, J.

Filed: June 4, 1982

*Digges, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

Cole, J., dissenting.

I dissent. As I see it, the evidence gives rise to a clear jury question.

APPENDIX B

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 978

September Term, 1980

RICHARD L. STACK

v.

CAPITAL-GAZETTE
NEWSPAPERS, INC.

Liss
Couch
Weant,
JJ.

Opinion by Couch, J.

Filed: April 13, 1981

This appeal involves the propriety of an order of the Circuit Court for Anne Arundel County by which it granted a motion for a directed verdict in favor of Capital-Gazette Newspapers, Inc. in a libel action brought by appellant, Richard L. Stack. Appellant was a Republican candidate in District 32 for the Maryland Senate in the November, 1978 general election, an election he lost to his Democratic opponent. The instant case was precipitated by the publishing of allegedly defamatory editorials by appellee October 26 and 27, 1978 in its newspapers, The Maryland Gazette and Evening Capital. After publication of the articles, and before the election, the appellant sued the appellee seeking damages. At the conclusion of all the evidence the trial judge directed a verdict in favor of appellee, and this

appeal followed. A single issue is raised - did the trial judge err in granting appellee's motion?

Since the appellant clearly was a public figure and the alleged defamatory statements were published by a newspaper, the right to recover is governed by New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). See also Kapiloff v. Dunn, 27 Md. App. 514, 343 A.2d251 (1975), and A. S. Abell Co. v. Barnes, 258 Md. 56, 265 A.2d 207 (1961). In Kapiloff, then Chief Judge Orth, quoting from New York Times, stated:

"[T]he New York Times standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing

proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.." Id. at 516.

This standard was expressly reaffirmed in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2996, 41 L.Ed.2d 789 (1974). Thus it seems settled that before appellant would be entitled to recover he had the burden of showing by clear and convincing evidence that the editorials were defamatory and that their publication was made either with knowledge of their falsity or with reckless disregard for the truth. Furthermore, as explicated in Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125(1964), knowing falsity or reckless disregard for truth involves proof of a high degree of awareness of probable falsity such that a defendant entertained serious doubts as to the truth of his public action. See also

St. Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262(1968).

The Facts

The appellant was the Republican candidate in District 32 for the Maryland Senate in the November, 1978 general election. On October 26 and 27, 1978, the appellee published the following editorial in its two newspapers, The Maryland Gazette and the Evening Capital:

"DISTRICT 32

THIS SENATE race in north county has been the biggest disappointment of any race in the area. What should have been a responsible battle between two intelligent men has turned into one of gutter politics - all because of the tactics of Republican challenger Richard Stack.

After the smoke of their primary battles had cleared, we expected a race

between Stack and H. Erle Schafer, two intelligent, personable candidates who we thought would discuss the issues which would affect the people of this northern Anne Arundel County district.

Instead, Stack chose to take the low road - a la former Sen. Joseph McCarthy. He had been conducting a campaign of smears and innuendos in attempting to divide the district's many Democrats.

Stack has refused to discuss the issues. While Schafer answered the many questionaires sent out by more than 20 political organizations, Stack not only refused to answer the questions, he demanded that the organizations provide him with Schafer's answers.

He insinuated that Schafer's Democratic primary opponent, Michael Wagner, was supporting him in the general election. He even said that

Schafer's running mate, Del. Tyras Athey, was on his side.

Both allegations have proven to be false - as have many other things Stack has said in the campaign.

Schafer is a former county councilman and is on leave of absence from his county job as Glen Burnie urban renewal director. He certainly has more experience in government than Stack and from what we have seen in this race is a more responsible human being.

The overwhelming choice here is Schafer. Stack does not belong in public office."

On November 1, 1978, appellant filed the instant suit alleging that the appellee published the editorial "with knowledge that the statements were false, or with reckless disregard as to whether the statements were true or false."

Both compensatory and punitive damages were sought. Appellant offered evidence to the effect that he actively campaigned, attended numerous coffees where he discussed the issues of the campaign, debated his opponent on the issues twice, attended numerous candidates' nights where he discussed the issues, conducted a walking door-to-door campaign, answered certain questionaires submitted to him by newspapers or organizations not representing special interests, and submitted to interviews by members of the press. He conceded that he refused to answer endorsement questionnaires from groups or organizations which represented special interests. There was further evidence that, prior to the publishing of the editorial, appellant had attended an editorial interview with appellee's representatives, reporters

and editor of The Maryland Gazette, at which appellant stated that he had the support of Tyras Athey, his opponent's ticket mate, and Michael Wagner, whom his opponent defeated in the Democratic primary. This statement was later denied by Athey and Wagner in an interview with appellee, although one of appellee's reporters had written an article, published in The Maryland Gazette on October 23, 1978, in which both Athey and Wagner were reported to have done certain things which could be interpreted as one time support for appellant. This article, however, made clear that neither man presently supported Stack. There was also evidence that Edward D. Casey, appellee's executive editor, had observed a political advertisement placed by appellant in The Maryland Gazette asking

whether Schafer, appellant's opponent, had "sold out," which Casey felt unfairly suggested that Schafer had "given something away." It was shown, however, that two of the three such advertisements were published after the editorial. Casey admitted on cross examination that his statement relative to "smears and innuendos" stemmed from the advertisements. He further explained that the basis for his statement about Wagner's and Athey's support as being false was their direct denial of support for Stack. He could not explain the statement that "many other things Stack has said in the campaign" have proven to be false.

The record reveals the following colloquy between appellant's counsel and Mr. Casey, appellee's executive editor:

"Q And I believe you stated in your

editorial, both allegations are proven to be false with reference to the allegation of Wagner and Athey's support -- as have many other things that Stack has said in the campaign. What were the many other things that Mr. Stack said in his campaign that proved to be false?

MR. AXELRAD [Appellee'ss attorney]: Objection.

COURT: Overrule it. You may answer.

A I don't know exactly many other things.

Q Well, that's what it says. It says, as have many other things.

A I'm not finished my answer. I would say that running advertisements, has Erle Schafer sold out. I mean, I think that is certainly a smear and an innuendo. And in my mind, at least, an untruth, because you can --

Q That's not the question.

MR. AXELRAD: Well, wait a minute. That's the answer.

COURT: Let him finish. You may finish, Mr. Casey.

A Could I have the question repeated again, please?

Q I asked you, what did you base the statement, as have many other things Stack has said in the campaign being proven to be false. What did you base that on?

A All right. Again, running advertisements like, has Mr. Schafer sold out. I believe that is, to me, a very damaging question. When you're questioning the integrity, you're questioning, has Mr. Schafer given something away. In return for what I don't know, because he hadn't voted on anything yet. Whether he's trying to plant in the minds of the reader that on every vote that Mr. Schafer makes he'll be giving something away to somebody, be promising somebody something. I think it's a definite smear, a definite innuendo. I'm just trying to recall some other things here now. Oh, I would definitely say when he -- he tells me to my face that he has the support of Mr. Athey and Mr. Wagner, and then less than 24 hours later these two people tell me to my face that in no way are they supporting him. I think -- I'd have to say that's an untruth.

Q Okay. Now, I let you finish your answer, and I'll go back and ask the question again. I prefaced the question when I asked it with both allegations have proven to be false. The two that you just gave me, with reference to Agner -- with reference to Athey and Wagner. It also says, as have many other things Stack has said in the campaign. The other thing you said was an ad that asked a question, has Erle Schafer sold out. Now, I'm asking you, what other things he said in the campaign that proved to be false?

MR. AXELRAD: Objection. He's already asked it.

COURT: Overrule it. You may answer, sir, if you haven't already.

A I cannot be specific any more than I have been on something that happened a year and a half ago.

Q So, there --

A I can't remember anything else at this point."

The appellee contends there was no error by the trial court in granting the motion for a directed verdict because:

(1) there was a failure by appellant to show by clear and convincing evidence that the defendant acted with actual malice;
(2) the defendant's editorial was constitutionally protected opinion and fair comment;
(3) there was no clear and convincing evidence that the editorial was false.

Further facts will be supplied as necessary in our discussion of the issue.

The Law

As stated above, appellant's burden, was to offer clear and convinc-

ing evidence that the editorial was false and made with actual malice. The law is settled that actual malice is the making of a statement with knowledge of its falsity or with reckless disregard for its truth or falsity. New York Times, supra; Berkey v. Delia, 287 Md. 302, 413 A.2d 170 (1980). As this Court said in Hohman v. A.S.Abell Co., 44 Md. App. 193, 407A.2d 794(1979):

"These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." Id. at 201. (Emphasis in original.)

Against this standard the evidence must be measured, along with the requirement that in ruling on appellee's motion the trial judge must

view the evidence in a light most favorable to the appellant. Boggs v. Citizens Bank & Trust Co., 32 Md. App. 500, 363 A. 2d 247 (1976).

The Decision

The evidence before the Court, when viewed in a light most favorable to the appellant, was such that if believed by the trier of fact it could conclude there was "clear and convincing" evidence of a reckless disregard of the truth or falsity of some of the statements made in the editorial. With reference to the statement about refusing to answer certain questionnaires, Stack told appellee why he did not answer those from organizations representating special interests but did answer others. Appellant also had discussed issues on other occasions. With respect to the editorial statement about

certain Democratic support, appellee obviously ignored the earlier news story in The Maryland Gazette which, to some extent, supported appellant's statement. Appellee had no explanation for that portion of the editorial wherein Stack was accused of making many other statements in the campaign which had proven to be false. In short, at least so far as that part of the editorial which states "as have many other things Stack has said in the campaign" is concerned, it would appear that appellee could be found to have recklessly disregarded the truth or falsity of that statement; thus the fact finder could have found actual malice.

With regard to appellee's argument that the editorial was protected because it was an opinion and fair comment, we need not tarry long. Parts

of the editorial probably fall into this class but that portion stating, in effect, that appellant had lied on many other occasions during the campaign was, in our view, a statement of fact. In A.S. Abell Co. v. Kirby, 227 Md. 267, 176 A. 2d 219 (1961), the Court of Appeals stated in part:

"The majority of the States (perhaps three-fourths) hold that the immune instances of public discussion are those limited to opinion,comment, and criticism, and do not embrace those in which there is any false assertion of defamatory fact. (Citations omitted.)

Maryland has consistently followed the majority rule - that defamatory misstatement of fact cannot be defended successfully as fair comment." Id. at 273.

The Court went to state, at 274:

"The distinction between 'fact' and 'opinion,' although theoretically and logically hard to dray, is usually reasonably determinable as a practical matter complained of, be likely to understand it as an expression of the writer's opinion or as a declaration of an existing fact? An opinion may be so stated as to raise directly the inference of a factual basis, and the defense

of fair comment usually has been held not to cover an opinion so stated."

Appellee also argues that there was no clear and convincing evidence that the editorial was untrue. Again, insofar as the statement therein about many other statements made by appellant during the campaign being false, we believe that appellant offered evidence which, if believed by the trier of fact, would show clearly that that statement was untrue. There was, for example, the testimony of a Mr. Farrell, one of appellee's reporters assigned to cover the campaign in District 32, that he knew of no instance during the campaign where the appellant had lied.

What the ultimate outcome of a jury trial here will be is, of course, unknown, and we have no desire to be interpreted as indicating what the out-

come should be. We do hold that appellant should have had his case go to the jury.

JUDGMENT REVERSED: CASE REMANDED FOR A NEW TRIAL.
COSTS TO ABIDE THE RESULT.

APPENDIX C

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY, MARYLAND

RICHARD L. STACK	*	
	*	
Plaintiff	*	
	*	
vs.	*	NO. D-3250 LAW
	*	
CAPITAL-GAZETTE	*	
NEWSPAPERS, INC.,	*	
a body corporate	*	
	*	
Defendant	*	

MEMORANDUM AND ORDER

This matter came on for hearing on the Demurrer of the Defendant, Capital-Gazette Newspapers, Inc. Counsel were heard, the proceedings and memoranda read and considered.

This case raises several issues involving the alleged defamation of a candidate for public office by a newspaer editorial. They are:

1. Was the editorial defamatory?

2. May the defense of fair comment be interposed on demurrer?

3. Does the Declaration state, with sufficient particularity, facts from which it may be inferred that the Defendant acted with "actual malice" so as to defeat the publisher's constitu-

tional privilege?

4. Does the Declaration contain adequate allegations of special damages?

I.

For the sake of clarity the editorial is set forth in its entirety:

"THIS SENATE race in north county has been the biggest disappointment of any race in the area. What should have been a responsible battle between two intelligent men has turned into one of gutter politics-all because of the tactics of Republican chanlenger Richard Stack.

"After the smoke of their primary battles had cleared, we expected a race between Stack and H. Erle Schafer, two intelligent, personable candidates who we thought would discuss the issues which would affect the people of this northern Anne Arundel County district.

"Instead, Stack chose to take the low road a la former Sen. Joseph McCarthy. He has been conducting a campaign of smears and innuendos in attempting to divide the district's many Democrats.

"Stack has refused to discuss the issues. While Schafer answered the many questionnaires sent out by more than 20 political organizations, Stack not only refused to answer the questions, he demanded that the organizations provide him with Schafer's answers.

"He insinuated that Schafer's Democratic primary opponent, Michael Wagner, was supporting him in the general election. He even said that Schafer's running mate, Del. Tyras Athey, was on his side.

"Both allegations have proven to be false-as have many other things Stack has said in the campaign.

"Schafer is a former county councilman and is on leave of absence from his county job as Glen Burnie urban renewal director. He certainly has more experience in government than Stack and from what we have see in this race is a more responsible human being.

"The overwhelming choice here is Schafer. Stack does not belong in public office."

Initially, it must be determined whether the editorial defamed the Plaintiff. The general test for determining whether particular words have a defamatory meaning is whether they tend "to expose (a person) to public scorn, hatred, contempt or ridicule." Thompson v. Upton, 218 Md. 433, 437 (1959). More specifically the common law of libel deems defamatory those statements which imputs falsehood or dishonesty to the plaintiff. See Simon v. Robinson, 221 Md. 200 (1959). Although numerous cases deal with the issue of what constitutes a

defamatory statement, the responsibility ultimately devolves upon the Court to determine whether the language of the editorial imputed dishonesty.

The Court finds that certain statements made in the editorial were defamatory. The editorial accused the the Plaintiff of conducting his political campaign with McCarthy-like tactics. Since the late Senator McCarthy was censured by the U. S. Senate for lodging false and unsubstantiated charges of criminal misconduct against innocent persons, likening the Plaintiff to him clearly ascribes dishonesty to him. It was also said that the Plaintiff falsely claimed to have the support of his opponent's running mate. In sum, the editorial represented the Plaintiff as deceitful and dishonest, and thus defamed him.

The Defendant also asserts that the editorial is not actionable, even if defamatory, because it merely expresses an opinion. Language from Gertz v. Robert Welch, Inc., 418 U. S. 323, 41 L. Ed. 2d 789 (1974) indicates that

the expression of an opinion concerning a public figure may not, consistent with the First Amendment's guarantee of free speech, provide the basis for an action for defamation. Therein the Court stated that:

"Under the First Amendment there is no such thing as a false idea. However, pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." 418 U.S. at 339-40, 41 L.Ed. 2d at 805.

Thus did the Supreme Court delineate the differing considerations pertaining to statements of opinion and those of fact. The error in the Defendant's argument lies in the failure to distinguish opinions which are constitutionally immune from those which are not.

Statements of "opinion" fall into two pigeonholes. On the one hand there is the "pure" expression of opinion in which the maker comments upon the "plaintiff's conduct, qualifications or character" after having stated the factual basis for the opinion. 3 Rest. Torts 2d, 566 Comm. b. On the other

hand is the opinion based upon an undisclosed factual premise which may reasonably be inferred. A. S. Abell Co. v. Kirby, 227 Md. 267, 274 (1962). Only the first catagory falls within the ambit of non-actionable defamatory communications. The Court believes that the defamatory statements alluded to above were in the nature of factual statements. To the extent that they expressed the Defendant's opinion, they nevertheless contained a factual premise which ascribed dishonesty to the Plaintiff and thus defamed him.

II.

The Defendant has also raised the defense of fair comment in the Demurrer. It contends that an editorial containing a fair and honest expression of opinion which is based upon true facts is absolutely privileged. The defense of fair comment protects a media defendant from liability for the honest expression of "a fair and reasonable opinion or comment on matters of legitimate public interest." A.S. Abell Co. v. Kirby, 227 Md. 267,272 (1961).

The rationale beneath the defense is that the expression of fair and honest opinions in matters of legitimate public concern should be promoted. See 1 Harper and James, The Law of Torts, 456. The Defendant argues that the editorial was such an expression of opinion on a matter of public interest. However valid this defense may prove to be, it cannot properly be raised on Demurrer.

The case of Walker v. D'Alesandro, 212 Md. 163 (1957) states the unchallenged general rule that the defense of qualified privilege may not be raised on demurrer. Id. at 169. Kerpelman v. Bricker, 23 Md. App. 628, 634 (1974). Thus the characterization of the defense of fair comment as an absolute or qualified privilege determines its availability on demurrer. In Kapiloff v. Dunn, 27 Md. App. 514 (1975), the Court of Special Appeals rejected the argument that in New York Times v. Sullivan, 376 U. S. 254, L. Ed. 2d (1964) and its progeny abolished the defense of fair comment by creating "an absolute privilege for all expressions of opinion on public matters." 27 Md. App. at 529.

On the contrary, the following language from New York Times supports the position that the Supreme Court considered fair comment to be a qualified privilege:

"Since the Fourteenth Amendment requires recognition of the conditional privilege for honest misstatements of fact, it follows that a defense of fair comment must be afforded for honest expression of opinion based upon privileged, as well as true, statements of fact. Both defenses are of course defeasible if the public official proves actual malice, as was not done here." 376 U. S. at 292, n.30.

In Curtis Publishing Co. v. Butts, 388 U.S. 130, 18 L. Ed. 2d 1094 (1967), Mr. Justice Harlan adverted to the distinction between absolute and qualified privilege and noted that fair comment was classified as a conditional privilege which "may be vitiated by proof of actual malice." 388 U. S. at 152, n. 18. The defense has also been characterized by leading authorities as a qualified privilege subject to defeasance upon proof of actual malice. Prosser, Law of Torts (4th ed.), p. 792; 1 Harper and James, supra, p. 457.

Moreover, logic precludes the sustaining of a demurrer based upon a

defense of fair comment. Since the defense raises factual issues concerning the"fairness" of the defamatory communication, it differs from a demurrer based upon a claim of absolute privilege where the availability of the privilege may properly be determined from the face of the pleadings. For these reasons the Court finds that a defense of fair comment may not be raised by demurrer.

III.

The Defendant's third thrust against the Declaration challenges the sufficiency of the factual allegations to sustain a finding of actual malice.

In the landmark decision of New York Times v. Sullivan, supra, the Supreme Court delimited the power of the States to award damages in actions brought by public officials against critics of their official conduct. It held that recovery was prohibited unless the plaintiff proved that the defamatory statement was made with actual malice which it defined as either (1) knowledge of falsity or (2) reckless disregard of truth or falsity. In subse-

quent cases the court extended the constitutional privilege to include not only public officials but also public figures. In Gertz v. Robert Welch, Inc., 418 U. S. 323, 41 L.Ed. 2d 789 (1974), the court extended the actual malice standard to all "public persons" defined as "those who by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classes as public figures. " 418 U. S. at 342. Having sought public office, both parties recognize that the Plaintiff is properly classified as a public person.

The reckless disregard prong of the actual malice standard was scrutinized in St. Amant v. Thompson, 390 U. S. 727, L. Ed. 2d (1968). It stated the rule to be that:

"Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual

malice." 390 U.S. at 731-32.

The Defendant argues that the Plaintiff has not pleaded with sufficient particularity to satisfy this stringent standard. The Court disagrees. The Declaration alleges that the Defendant published the defamatory statements "falsely, recklessly, knowingly and maliciously." The question becomes whether the Declaration contains a "clear statement of the facts necessary to constitute a cause of action." MD. R.P. 301 c. The Declaration states that the newspaper published the defamatory falshood knowingly. Knowing falsity constitutes actual malice under New York Times, supra.

The recent decision of the Court of Appeals in Metromedia v. Hillman, ___Md.___,400 A.2d 1117 (1979), sets forth the requirements for compliance with the Maryland pleading rules in light of modern developments in the law of defamation. The pertinent test for a declaration to withstand an attack by demurrer is that the plaintiff must plead that the defendant published a

false and defamatory statement which was known to be false and defamatory. 400 A. 2d at 1123. Although a plaintiff faces stiff obstacles in proving either knowing falsity or reckless disregard, these problems of proof are not germane to a ruling on the demurrer. The sufficiency of the factual support for the allegations of the Declaration can be challenged by a motion for summary judgment The Court finds that the allegations of the Declaration are legally sufficient to support a cause of action for defamation.

IV.

The attack upon the sufficiency of allegations of injury falls wide of the mark. Metromedia, supra, recapitulating the teaching of Gertz v. Welch, supra, and Jacron v. Sindorf, 276 Md. 580 (1976), requires "allegations of damages with some particularity, since Gertz and Jacron forbid presumed damages." 400 A.2d at 1123. Actual injury includes not only out-of-pocket losses but also "impairment of reputation and standing in the community, personal

humiliation, and mental anguish and suffering'. 418 U.S. at 350." Jacron, supra, at 587. The declaration alleges that the Plaintiff has suffered "great humiliation, embarrassment, contempt, ridicule, severe mental anguish, permanent injury to his reputation and damage to his position in the community." The Declaration is not demurrable for failing to allege actual injury.

WHEREFORE, it is this_____day of July, 1979, by the Circuit Court for Anne Arundel County, ORDERED, that the Defendant's Demurrer be, and it is hereby, overruled.

_____

Raymond G. Thieme,Jr.,
Judge

Copy to: Russell Jay Bennett, Esquire
Harold B. Murnane, III, Esq.
Lawrence F. Rodowsky, Esquire

APPENDIX D

JUDGE RAYMOND G. THIEME'S RULING ON MOTION FOR DIRECTED VERDICT AT THE END OF ALL EVIDENCE

COURT: Gentlemen, I still come back to what I originally came on the bench with afterwards. I feel I, under law, I have no choice but to grant the Defendant's motion. If the evidence has been adduced in -- in the case is sufficient to take the case to the jury, based upon the evidence presented. It's my personal opinion the First Amendment doesn't mean much. And I can rely upon what -- well, not rely upon, quote what Judge Eldridge said, I realize I'm quoting from the dissent, but I still believe it's good law. That no one likes to hear, or have his family or friends hear such allegations, referring to the case in question. However, they come with the job. If one wants to be a public servant or free society he must develope a thick skin. But the standard as is set forth in Burkley, I'm referr-

ing now to Part 3 of the Majority Opinion, Pages 10 and 11, particularly from the quote in Saint Amont versus Thompson, to me just leaves the Court just no -- no choice in the matter. I just find that there is no evidence that would permit the trier of fact to draw the conclusion that the, Mr. Casey entertained serious doubts as to the truth of his publication. That's just -- and in arriving at that verdict I accept, so that the record is clear, that the statements are false. I accept that in arriving at it. What -- what bothered the Court has bothered the Court all the way through the case, is this malice, actual malice. And that is what the Court find is -- is lacking. So, for those reasons the Court feels that it has no choice but to grant the motion.

APPENDIX E

NEWSPAPER ARTICLE, PUBLISHED IN THE MARYLAND GAZETTE ON OCTOBER 23, 1978 AND SUBSEQUENTLY IN THE EVENING CAPITAL

"MUD FLIES IN SCHAFER-STACK RACE"

By John Aloysius Farrell

Staff Writer

Politics, the cliche goes, makes strange bedfellows.

But nowhere this year has the political coupling been so confusing as in the bitter contest for the District 32 State Senate seat --- representing Linthicum, Jessup, Ferndale and most of Glen Burnie.

There, the Bunky and Erle and

Richard and Mike Show is making Bob and Carol and Ted and Alice look like The Waltons.

The political bedsheets in this district are barely cold before another warm body rushes in to share the covers while candidates scurry to and from like startled Lotharios.

Get your scorecard ready. It all began in 1974.

At that time there were two slates formed to battle for the Democratic nomination in the State Senate primary.

On one side was former state Sen. Alfred Lipin, who teamed with Delegates Franklin Thomason and Tyras "Bunky" Athey.

Lipin was opposed by H. Erle Schafer, former County Councilman, who was running with a delegate slate that included Michael Wagner.

Lipin, Thomason, Athey, and Wagner won. Schafer lost, he has charged for four years, because Lipin put up a ringer named Schaefer who drew votes away from him. Schafer took it bitterly, but Wagner joined the Lipin slate and was elected in the general election as a delegate.

Glen Burnie lawyer Richard Stack, a Republican, ran for House of Delegates against the Lipin team in that election. Stack says now he was endorsed by Schafer because Schafer could not forgive Lipin for the primary defeat. Schafer denies it. Stack lost, with or without his help.

Three years later Lipin took a state job as a payoff, the talk goes, for his vote for the Baltimore subway.

To fill that seat the Democratic Central Committee met and interviewed

candidates. Among the contenders were Wagner, Schafer, and Thomason.

Thomason lost when Committee Chairman George Schminke split from Lipin and threw his support to Wagner. Schafer, who thought he deserved the seat because of the close call in 1974, lost because Wagner won Athey's support and because the Central Committee was angry with Schafer for sitting out the general election and working for Republican Bob Pascal after losing his primary in 1974.

Wagner and Schafer, allies in 1974, became political enemies. And Schafer challenged Wagner in the 1978 primary with his old foe Lipin's support.

Schminke, with Wagner and Athey's support, got himself appointed to Wagner's vacant delegate seat.

In this year's primary Schafer

beat Wagner but all of Wagner's delegates, Athey, Schminke and newcomer Patrick Scanello won. Thomason ran with Schaefer, a former enemy, and lost.

Stack, in the meantime, challenged the Democrats for the State Senate seat.

The Democratic primary was bitter. Athey and Wagner say that Schafer supporters used underhanded campaign tactics to win. Each side spent over $40,000. On election night Stack walked into Wagner headquarters with an armful of campaign literature and got a warm reception from many disgruntled Wagner workers.

The extent of his support among Democrats has become an issue in this year's race, which has emerged as the most bitter county contest.

Stack claims that soon after the primary he was called by Athey and

offered support.

He says that Scanello's campaign manager stopped by Stack headquarters and picked up lawn signs and literature to distribute.

And the Republican notes that Wagner gave him three glossy photographs of some run-down properties in Glen Burnie that Schafer, the former Urban Renewal Director, owns to use in a smear campaign.

Stack says he will win because the Democrats still hurt from the bitter primary, and some north county Democrats agree.

Schafer maintains that he did not make any commitments to the remnants of the Wagner ticket--which was well supported by liquor and tavern interests --to keep Wagner ally Thomas Riggins on the county liquor board or to keep

Wagner liquor inspectors on the job.

Stack says that an argument over patronage in liquor board appointments has kept the Wagner and Schafer camps apart.

The in-fighting is in sharp contrast to the picture of party unity projected by Schafer and his ticket.

Athey admits he did meet with Stack, after calling the Republican in a fit of "post-election emotion." He says he has since reconciled his differences with Schafer and does not intend to help Stack in any way.

Scanello says that his campaign manager was just doing some bird-dogging when visiting Stack headquarters on a mission of political espionage.

And Wagner admits that he did pass the photographs to Stack, but that he has since reached an understanding

with Schafer, mindful of what happens to Democrats who get caught in the open supporting Republicans.

And so Wagner, who began as friend and turned to foe, has become a friend again--at least on paper. He says he will issue a ringing endorsement for Schafer this week.

Stack, who says that he received support from Schafer against Wagner in 1974, and is now receiving support from Wagner against Schafer in 1976, can only hope that the bedsheets keep rustling.

Schafer, who ran with Wagner against Athey, and then against Wagner and Athey, is now running with Athey and counting on Wagner for support.

And there are still two weeks of campaigning to go.

No. 82-384

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FILED
OCT 18 1982
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In The

Supreme Court of the United States

October Term, 1982

RICHARD L. STACK,

Petitioner,

vs.

CAPITAL-GAZETTE NEWSPAPERS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Court of Appeals of Maryland correct in affirming the directed verdict granted respondent when the court found upon a careful examination of the record that petitioner produced no evidence from which the trier of fact could infer that the publisher acted with reckless disregard of the truth of its editorial statements and when the court expressly found both that the evidence showed that the publisher acted on a reasonable belief that the statements in the editorial were substantially correct and that there was no evidence to impeach the publisher's good faith?[1]

---

1. Pursuant to Supreme Court Rule 28.1, Capital-Gazette, Inc., states that Landmark Communications, Inc., a Virginia corporation, owns a substantial minority interest in Capital-Gazette. Respondent has no affiliates or partially owned subsidiaries.

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RICHARD L. STACK,

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CAPITAL-GAZETTE NEWSPAPERS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of Maryland

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Capital-Gazette Newspapers, Inc. ("Capital-Gazette"), respectfully requests that this Court deny the petition for certiorari filed by Richard Stack ("Stack"). Stack asks this Court to review the decision of the Court of Appeals of Maryland affirming the decision of the Circuit Court for Anne Arundel County, Maryland. The decision of the Court of Appeals is reported at 293 Md. 528, 445 A. 2d 1038 (1982).

STATEMENT OF THE CASE

This libel action brought by Stack against Capital-Gazette seeks damages for an editorial published on October 26 and 27, 1978, in two of respondent's newspapers. That editorial endorsed H. Erle Schafer for election to the Maryland Senate over Stack, Schafer's opponent.

The editorial read as follows:

DISTRICT 32

THIS SENATE race in north county has been the biggest disappointment of any race in the area. What should have been a responsible battle between two intelligent men has turned into one of gutter politics — all because of the tactics of Republican challenger Richard Stack.

After the smoke of their primary battles had cleared, we expected a race between Stack and H. Erle Schafer, two intelligent, personable candidates who we thought would discuss the issues which would affect the people of this northern Anne Arundel County district.

Instead, Stack chose to take the low road — a la former Sen. Joseph McCarthy. He has been conducting a campaign of smears and innuendos in attempting to divide the district's many Democrats.

Stack has refused to discuss the issues. While Schafer answered the many questionnaires sent out by more than 20 political organizations, Stack not

only refused to answer the questions, he demanded that the organizations provide him with Schafer's answers.

He insinuated that Schafer's Democratic primary opponent, Michael Wagner, was supporting him in the general election. He even said that Schafer's running mate, Del. Tyras Athey, was on his side.

Both allegations have proven to be false — as have many other things Stack has said in the campaign.

Schafer is a former county councilman and is on leave of absence from his county job as Glen Burnie urban renewal director. He certainly has more experience in government than Stack and from what we have seen in this race is a more responsible human being.

The overwhelming choice here is Schafer. Stack does not belong in public office.

The editorial was written by respondent's executive editor, Edward Casey. The opinion of the Court of Appeals noted Casey's widespread investigation of the candidates before he wrote the editorial:

> [He] had observed Stack at the 19 October 1978 candidate endorsement meeting and, therefore, had some personal knowledge of him. Before writing the editorial, Casey undertook a substantial investigation of the campaign. He examined the background and experience of each of the

> candidates. He reviewed various news stories written during the campaign. He solicited candidate endorsements from others. He noted that Stack did not have a platform, had on occasion refused to discuss issues, and had on occasion refused to answer questionnaires. He was present when Stack asserted that prominent Democrats were supporting him as well as when those Democrats subsequently denied the assertion. He believed the Democrats and concluded that Stack had made a false statement. He reviewed an ad used by Stack that he believed contained untruths designed to vilify Schafer.

445 A. 2d at 1045 (Petition for Certiorari at 31a-32a).

Stack filed suit following publication. After discovery by both parties, a jury trial was held, Judge Raymond Thieme presiding. At the close of all the evidence Judge Thieme granted Capital-Gazette's motion for a directed verdict. Stack appealed that decision to the Court of Special Appeals, which reversed the trial court and remanded for a new trial. The Court of Appeals then granted Capital-Gazette's petition for a writ of certiorari. In an opinion w 'en by Judge Rita Davidson, handed down on June 4, 1982, the Court of Appeals reversed the intermediate court and affirmed the decision of the trial court. Stack then filed this petition.

REASONS FOR DENYING THE WRIT

Summary of Argument

The decision below was based on the routine application of well-settled law. Petitioner, a public figure, unable to produce any of the evidence of actual malice required by the clear decisions

of this Court, simply asserts that, as a matter of federal constitutional law, the state court should have permitted a jury to hear his case. That assertion is supported by neither precedent nor policy. Hence, the courts below correctly held that the failure to produce evidence of actual malice precluded petitioner from taking his case to the jury.[2]

The Court of Appeals of Maryland correctly affirmed the trial court's grant of a directed verdict for respondent when petitioner failed to introduce any evidence establishing actual malice on the part of respondent.

The decision of the Court of Appeals raises no new legal issues. That decision, to the contrary, rests on established constitutional principles laid down by this Court over the past two decades, "principles," Judge Davidson observed, that "have been frequently reiterated by the Supreme Court." 445 A. 2d at 1044 (Petition for Certiorari at 29a).

In particular, this case involves the requirement that Stack, concededly a public figure (Petition for Certiorari at 17), must establish actual malice before he can be awarded damages, and that "actual malice" can be established only by evidence that the publisher had a high degree of awareness of probable falsity concerning his statements, or that their publication, absent further investigation, demonstrated a lack of good faith. *Herbert v. Lando*, 441 U.S. 153 (1979); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

---

2. Because the Court of Appeals found insufficient evidence of actual malice to permit the case to go to the jury, it did not consider Capital-Gazette's contention that the editorial was both constitutionally protected opinion and protected under the state law of fair comment. *See* 445 A. 2d at 1046 n.1 (Petition For Certiorari at 35a-36a).

Stack had numerous opportunities, through pre-trial discovery, the presentation of direct evidence and cross-examination to establish the malice required by *New York Times v. Sullivan*. This he failed to do.

The significance of that failure is made clear in Judge Davidson's opinion. The Court of Appeals, following a lengthy review of the law developed by this Court and the facts developed at trial, held:

> We can only conclude that *there was insufficent evidence from which a trier of fact could find or infer* that the publisher had a high degree of subjective "awareness of [the] probable falsity" of the editorial statements or that it had "serious doubts as to the truth" of the editorial statements or that it "knew or had reason to suspect" that the editorial statements were false.

445 A. 2d at 1045-46 (Petition for Certiorari at 35a) (emphasis added). The trial judge agreed. In his opinion granting a directed verdict for respondent, Judge Thieme said: "I just find that there is no evidence that would permit the trier of fact to draw the conclusion that the, Casey entertained serious doubts as to the truth of his publication." (Petition for Certiorari at 77a).

The evidence amply demonstrates the correctness of those holdings. "[T]he record," Judge Davidson observed, "does not show that Casey was aware of any falsity in the editorial." 445 A. 2d at 1045 (Petition for Certiorari at 34a). Further, Casey, before writing the editorial, "undertook a substantial investigation of the campaign." *Id.* (Petition for Certiorari at 31a). That investigation, Judge Davidson wrote, "shows that Casey acted on a reasonable belief that the statements in the editorial were substantially correct. *There was no evidence* to impeach Casey's

good faith." *Id.* (Petition for Certiorari at 32a-33a) (emphasis added). Finally, the thorough analysis of the evidence by Judge Davidson makes clear that there were factual bases for every statement made in the editorial. Because Stack failed to produce evidence from which the finder of fact could infer actual malice, there was nothing for the jury to consider. Hence, the directed verdict on behalf of respondent was proper.

To avoid his failure to introduce any such evidence, Stack contends that issues of credibility, especially in defamation cases, should not be resolved by directed verdict or summary judgment. That argument, in the context of this case, is clearly a red herring because petitioner did not produce sufficient evidence to raise, under the standards elaborated by this Court, any question concerning Casey's good faith. As *St. Amant v. Thompson* clearly held, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." 390 U.S. at 731.

Petitioner's argument would stand *St. Amant* and *New York Times* on their heads, for it would give any plaintiff in any defamation case the right to recover damages in the absence of *any* factual evidence from which a finder of fact could infer that the writer of the article had entertained serious doubts concerning its veracity. Stack would permit recovery based on mere speculation in the absence of independent evidence. That speculation would hardly provide the "clear and convincing proof" of actual malice required by *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Unless a plaintiff is required to introduce constitutionally sufficient evidence of malice, the protection accorded defamation defendants by *New York Times* and *St. Amant* could be stripped from them by a hostile jury.

Contrary to Stack's assertion, the decision of the Court of Appeals does not disturb the constitutional balance struck by *New*

York Times and its progeny. Nothing in Judge Davidson's opinion suggests that the Court of Appeals interpreted that line of cases as precluding recovery except where the publisher admits to knowing falsity or reckless disregard for the truth. Rather, the Court of Appeals expressly reaffirmed that a jury question is presented on the issue of reckless disregard for the truth, notwithstanding the writer's protestation of good faith, not only when there is a showing that "a defamatory statement was a calculated falsehood or lie knowing and deliberately published," but, in addition, when there is a showing that:

> a defamatory statement was the product of the publisher's imagination; a defamatory statement was so inherently improbable that only a reckless person would have put it in circulation; or the publisher had obvious reasons to distrust the accuracy of the alleged defamatory statement or the reliability of the source of the statement. . . .

445 A. 2d at 1044 (Petition for Certiorari at 26a-27a) (citation omitted).

The Court of Appeals, in applying those tests, merely held that the trial court had correctly found the record devoid of evidence sufficient to permit a trier of fact to find or infer that Casey had reason to suspect that his statements were false. Accordingly, Casey's credibility or good faith was not at issue. Clearly, however, the Court of Appeals, in conformity with this Court's rulings, has left the door open for a plaintiff to get his case to the jury when there is sufficient circumstantial evidence from which it could be inferred that the publisher's statements were made with the requisite malice.

Petitioner indicates that Casey could have conducted an even more thorough investigation, describing specific alleged omissions.

The Court of Appeals carefully considered this evidence and found that Casey's omission, in light of his having undertaken a "substantial investigation," would at most support "a finding of negligence." 445 Md. at 1045 (Petition for Certiorari at 34a-35a). Negligence, however, does not establish actual malice. *Garrison v. Louisiana*, 379 U.S. 64, 73-74 (1964).

Stack, in essence, has asked this Court to review his case for the purpose of establishing a blanket rule that a directed verdict is *always* inappropriate in a defamation case, a rule to be applied even when, as here, the trial court finds there is no evidence that would permit the jury to draw the conclusion that the writer entertained serious doubts about the truth of his publication. Petitioner would permit the jury to infer the constitutionally requisite "serious doubts" by speculating with regard to the credibility of the writer. He would permit such speculation in the absence of independent evidence that would allow a finding that the writer wrote with actual malice. Such a rule does not exist elsewhere in our law, and the creation of a unique rule for defamation actions would be contrary both to precedent and the First Amendment.

In affirming the trial court's grant of a directed verdict the Court of Appeals correctly followed this Court's longstanding precedents in determining whether the evidence presented at trial satisfied the constitutional requirements of a defamation action.[3]

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3. Stack's attempt to attach significance to the failure of the trial court to grant a directed verdict after the close of plaintiff's evidence, granting it only after the close of all of the evidence, is misplaced. The trial court could easily have decided, as trial judges often surely do, to deny the motion even if the technical requirements for granting it had been met. The opportunity of Stack to establish actual malice by cross-examination of Capital-Gazette's witnesses can be viewed as an extension of the opportunity presented by *Herbert v. Lando* to inquire into the knowledge that the writer of the editorial in question had at the time the editorial was written. The failure of Stack to elicit on cross-

(Cont'd)

That determination by two courts concerning the sufficiency of the evidence raises no new questions of law for this Court to review.

Accordingly, the opinion of the Court of Appeals raises no questions of constitutional dimension. In *New York Times* and its progeny this Court reconciled the competing interests of state defamation law and the First Amendment. This Court's primary concern has been to define the nature of the constitutional privilege necessary to protect free speech guaranteed by the First Amendment from the restraints imposed by the common law of defamation. *Gertz v. Robert Welch, Inc.*, 418 U.S. at 334. State law is of constitutional significance only to the extent that it interferes with rights granted by the First Amendment. Accordingly, the standards employed by a state court in considering a motion for a directed verdict are not of constitutional significance unless those standards impinge upon the protection granted defendants under *New York Times* and subsequent cases. Where a state court, in accordance with its rules of procedure, determines that the evidence is insufficient for the jury to find that state defamation law has been violated, no constitutional issue is raised under the First Amendment.

Stack argues, finally, that the Court of Appeals misconstrued its own precedent, *Berkey v. Delia*, 287 Md. 302, 413 A. 2d 170 (1980). Failure of a state court to follow its own precedents does not provide a proper basis for review by this Court. In any event, the Court of Appeals did not misconstrue its own precedent. *Berkey* involved the propriety of granting summary

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(Cont'd)

examination any such knowledge surely makes clear that the trial judge correctly granted respondent's motion for a direct verdict. The issue, in short, was not one of the credibility of the defense witnesses but, rather, the absence of *any* evidence of actual malice.

judgment when there existed a conflict in testimony concerning events which led a psychiatrist who had been arrested by a policeman to write a letter to the policeman's superiors complaining about the mental fitness of the arresting officer. The conflicting testimony in that case, as interpreted by the Court of Appeals, clearly presented the kind of factual controversy that a jury normally is expected to hear. There was no such conflict in the case at bar.

Moreover, *Berkey* and each of the other cases cited by petitioner addressed the propriety of granting summary judgment. The case at bar involves a directed verdict at the close of all the evidence, not a trial by affidavit.

Because Stack failed to introduce the evidence of actual malice required by well-settled law, the trial court properly directed a verdict against him. Respondent respectfully requests, therefore, that the petition for certiorari be denied.

CONCLUSION

Petitioner's quarrel with the decision of the Court of Appeals is, in fact, a disguised attack on *New York Times v. Sullivan* and its progeny; it is perfectly clear that the Court of Appeals correctly applied the law laid down by this Court. Respondent respectfully suggests, therefore, that the petition for certiorari should be denied.

Respectfully submitted,

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